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No. 01-1440

Supreme Court, U.S.
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In The

Supreme Court of the United States

BENJAMIN K. ORIN,

Petitioner,

v.

RICHARD BARCLAY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REASONS TO GRANT THE PETITION

A. All Facts Must Be Construed in Favor of Petitioner Orin.

Throughout their opposition brief, respondents Alan Hornberg and Rick McCluskey attempt to strengthen their arguments by perverting the factual context in which this case arose. The district court granted summary judgment against petitioner Benjamin Orin on all claims. Petition for Writ of Certiorari ("Pet.") at App. 42-43. Therefore, there should be no factual issues at this juncture, for all facts must be construed in Orin's favor. Hornberg and McCluskey fail to grant this deference when making numerous hotly disputed allegations that Orin or his two friends acted violently, had a history of inciting violence, and incited the crowd with racial or sexist epithets. This Court should not be distracted by these disputed facts. The Court need not resolve any factual disputes in order to consider the Questions Presented.

B. The College Officials and the Ninth Circuit Treated the Student Center Area as a Public Forum.

Hornberg and McCluskey place unfounded reliance on the principle that a public college campus is not necessarily a public forum. For, as here, a public college can create a public forum on all or part of its campus when it allows public speakers. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981). It is undisputed that the college officials, respondents Richard Barclay and Robert Wallace, allowed petitioner Orin on campus and directed him to the student center area for the

purpose of demonstrating. Pet. at App. 3, 10; Brief in Opposition to Petition for Writ of Certiorari ("Opp'n") at 1 ("petitioner was allowed to demonstrate in front of the Bremer Student Center"). Thus, at the least, the college officials made the area a public forum for purposes of Orin's expression and the hostile crowd's opposition to Orin. At no point in this litigation has any defendant-respondent argued that the student center area was not a public forum. Nor has anyone argued that the police officers believed that the student center area was not a public forum. The Ninth Circuit treated the area as a public forum. Pet. at App. 10-11; *see* Pet. at 20 n.6. The Questions Presented in Orin's petition are properly set in the context of the arrest of a speaker in a public forum on a public college campus.

C. There Can Be No Probable Cause to Arrest for Actions that the First Amendment Protects.

Hornberg's and McCluskey's arguments only serve to manifest the reasons why this Court should review this case. Officers Hornberg and McCluskey believe they can arrest a speaker in a public forum because a crowd gathers and grows increasingly hostile to the speech. Yet they fail to engage the critical question about probable cause that Orin raised in his petition. Their arguments pertain to whether the officers reasonably believed that the Washington criminal trespass and failure to disperse statutes prohibited Orin's activities.

But Orin's point is this: Inherent in determining probable cause in this context is determining whether the First Amendment protects the speech or conduct at issue. Before an officer, or a court, even considers whether a

demonstration in a public forum violates a state criminal statute, he must ask whether the Free Speech Clause protects the demonstration (or parts of it). The officer or court cannot simply assume that because a statute prohibits the activity, the First Amendment does not protect it.

In the context of a hostile audience, determining whether the First Amendment protects the speech or conduct primarily means assessing whether the speaker has intentionally incited imminent lawless action and is likely to succeed. *See infra*. Hornberg and McCluskey argue that officers can arrest, without *any* inquiry, a speaker in a public forum where the government officials claim the speakers "violated the conditions of their license to remain" in the forum. *See* Opp'n at 8.

But what if the terms or application of the "license" were unconstitutional? According to Hornberg and McCluskey, that question is immaterial, *see* Opp'n at 6-9, 16; all the police need is information from government officials indicating that the speaker has broken the rules. Yet if that is the case, then government officials can engage in the most invidious of discriminatory acts and then call the police to enforce the discrimination. After arresting the speaker, the officers can claim immunity as long as they never knew (or bothered to ask) the reasons for the government's action. If this is not the law, then this Court should intervene lest this misconception prevail.

To the extent that the First Amendment protects, a state statute cannot prohibit. It follows that an officer's belief that he is not violating the First Amendment is not made reasonable by the fact that he has probable cause to

arrest for violation of a state statute.[1] Hornberg and McCluskey completely fail to address this point. *See* Opp'n at 6-9. They make no effort to show how the decision below does not conflict with this Court's decisions which demonstrate that speech or conduct protected by the First Amendment cannot be criminal. *See* Pet. at 22-23. Likewise, they fail to offer any reason as to why this Court should not stop the dangerous precedent below which tells officers that they need not consider a speaker's First Amendment rights if the officers reasonably believe that the speaker's expression violates a state statute.

D. The Decision Below Conflicts with Decisions Regarding Hostile Audiences.

1. Circuit court decisions.

Hornberg and McCluskey imply that the Ninth Circuit's decision in *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1997), somehow nullifies the conflict among the decision below and the hostile audience cases in the Fifth, Sixth, and Eleventh Circuits that Orin discusses in his petition. *See* Opp'n at 10. Yet *Collins*, which arose out of the Rodney King riots in Los Angeles, only demonstrates further conflict. Ironically, Hornberg and McCluskey quote a passage from *Collins* that supports Orin's position, not theirs. The passage is one in which the Ninth Circuit holds that police should arrest only those who are *actually*

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[1] Even putting the First Amendment aside, Orin does not concede that officers Hornberg and McCluskey had probable cause to arrest him. *See* Pet. at App. 18-21 (Boochever, J., concurring in decision below).

violent, not those (like Orin) who engage in protected speech. *See* 110 F.3d at 1372. Indeed, in his concurrence to the decision below, Judge Boochever quotes the same passage from *Collins* in explaining that there was no probable cause to arrest Orin. Pet. at App. 21-22. Orin cited *Collins* extensively to the Ninth Circuit, yet the majority opinion does not mention it. Absent this Court's intervention here, lower courts will likely view the decision below as controlling over *Collins* because the decision below is more recent.

Even if *Collins* were the Ninth Circuit's controlling decision in this area, it would not resolve the circuit court conflict regarding when it is appropriate to arrest a speaker based on the hostile reaction of the speaker's audience. *Collins* does not address this issue directly. To the extent that *Collins* requires "an adequate police presence" to protect First Amendment expression without exception, 110 F.3d at 1372, it conflicts with cases such as *Beckerman v. Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981), which allow arrest of a speaker if control of the hostile crowd becomes impossible.

Hornberg's and McCluskey's assertion that the decision below is distinguishable from the other circuit court decisions because Hornberg and McCluskey had probable cause based on "actionable conduct, not the content of the speech," Opp'n at 11, begs the question: Does the First Amendment protect the speech or conduct at issue? The courts in *Beckerman*, *Glasson v. Louisville*, 518 F.2d 899 (6th Cir. 1975), and *Sabel v. Stynchcombe*, 746 F.2d 728 (11th Cir. 1984), each had to address this question. As noted above, an officer or a court must consider this question before determining probable cause. *See Sabel*,

746 F.2d at 731 (holding that arrests for refusal to disperse violated First Amendment).

In addition, even if Hornberg and McCluskey accurately assert that other Fifth, Sixth, and Eleventh Circuit cases recognize the right of public colleges to reasonably regulate their campuses, this does not obviate or address the conflict among *Beckerman*, *Glasson*, *Sabel*, and the decision below.

2. U.S. Supreme Court decisions.

Officers Hornberg and McCluskey fail to distinguish the present case from *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Gregory v. Chicago*, 394 U.S. 111 (1969). Both cases address free speech rights in a public setting. *See* 337 U.S. at 2-3; 394 U.S. at 111-12. Likewise, the fact that neither case addresses qualified immunity does not diminish the cases' importance in showing the constitutional response to a speaker opposed by a hostile audience.

Hornberg and McCluskey also miss the point about the Washington criminal statutes. Whether the challenge is labeled facial or as applied, throughout this litigation Orin has argued that the officers had no probable cause to arrest because the First Amendment protects the actions for which the officers arrested him.

Hornberg's and McCluskey's reliance on *Adderley v. Florida*, 385 U.S. 39 (1966), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), is misplaced. Although *Adderley* predated this Court's "public forum" line of cases, in *Adderley* the Court rested its holding in part on the fact that the government arrested the speakers when they refused to leave "jail grounds reserved for jail uses." 385

U.S. at 47. The government had not opened the forum for public use, as the college officials did in the present case. In *Cantwell*, this Court reversed the defendant's conviction for breach of the peace as unconstitutional. 310 U.S. at 307-11.

More important, *Adderley* and *Cantwell* are outdated to the extent that they bear on the government's response to inflammatory or inciting speech in a public forum. This Court made clear in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Texas v. Johnson*, 491 U.S. 397 (1989), that the government can prohibit provocative speech due to its likelihood to incite others only when "the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Johnson*, 491 U.S. at 409 (quoting *Brandenburg*, 395 U.S. at 447).

E. The Decision Below Conflicts with Cases Regarding the Proper Degree of Scrutiny.

Hornberg and McCluskey acknowledge that Orin's arrest was precipitated by the hostile reaction of the audience that opposed Orin. *See* Opp'n at 3 ¶ 2. Yet the officers fail to take issue with the decisions of this Court and the D.C. Circuit which hold that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *accord Christian Knights of the Klu Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 373-74 (D.C. Cir. 1992). Even if the officers were unaware of specific conditions that college officials Barclay and Wallace placed on Orin, officers Hornberg and McCluskey chose to arrest Orin based on the hostile reaction of the listeners. This was a content-based decision

that a court must review with strict scrutiny. *See* Pet. at 19-20. The Ninth Circuit failed to apply strict scrutiny and, thus, the decision below conflicts with decisions of this Court and the D.C. Circuit.

Orin also rejects the assertion of respondent college officials Barclay and Wallace that "they have no direct interest in the outcome of the petition." Letter from William B. Collins, Senior Assistant Attorney General, State of Washington, to William K. Suter, Clerk of the Court (May 31, 2002). The Ninth Circuit's holding that two of the conditions imposed by the college officials were constitutionally valid, content-neutral regulations favors Barclay and Wallace. Likewise, Orin was arrested as a result of actions taken by Barclay and Wallace. For these reasons, Barclay and Wallace have a direct interest in Orin's challenges to the Ninth Circuit's holding and to his arrest.

F. The Decision Below Conflicts with This Court's Decisions Regarding Preventing Imminent Lawless Action.

Officers Hornberg and McCluskey concede that they had no independent basis for arresting Orin. Rather they attempt to justify the arrest because the crowd was growing hostile. Astonishingly, Hornberg and McCluskey (like the Ninth Circuit) fail to even mention, much less apply, *Brandenburg* and *Johnson*, which set forth this Court's standard for constitutionally prohibiting speech that incites imminent lawless action: The expression must be directed to inciting or producing imminent lawless action and must be likely to incite or produce such action. *Johnson*, 491 U.S. at 409 (quoting *Brandenburg*, 395 U.S. at 447). Obviously, the officers know that this Court's

precedents do not support the "heckler's veto" that their actions in this matter have established.

It is unnecessary for this Court to decide how the intent element of the *Brandenburg* standard – that the expression be *directed* to inciting – must be proved. On the record below, at the summary judgment stage, there is absolutely no indication that Orin intended to incite violence or lawless action. Instead, this Court should review the decision below to reverse conflicting precedent in the nation's largest circuit that fails to apply the *Brandenburg* standard and, thus, gives license to unconstitutional suppression of speech.

CONCLUSION

In their opposition brief, respondents Alan Hornberg and Rick McCluskey repeatedly assert that petitioner Orin's arrest must have been constitutional because the officers allegedly had probable cause under state criminal statutes. Yet Hornberg and McCluskey fail to show that the First Amendment does not protect the activity for which Orin was arrested. More important, they fail to show how the decision below does not conflict in important ways with decisions of this Court and the circuit courts in regard to hostile audiences. For these reasons, and those

stated in Orin's petition for writ of certiorari, Orin respectfully asks the Court to grant the petition.

Respectfully submitted,

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